

CALENDAR ITEM

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08/11/09

PRC 4173.1

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J. Frey

B. Terry

**CONSIDER DENIAL OF AN APPLICATION FOR A GENERAL LEASE –
RECREATIONAL USE AND AUTHORIZATION FOR LITIGATION FOR TRESPASS
AND EJECTMENT**

APPLICANT/PARTY:

Cedar Flat Improvement Association
P.O. Box 6358
Tahoe City, CA 96145

AREA, LAND TYPE, AND LOCATION:

Sovereign lands in Lake Tahoe, adjacent to 4370 North Lake Boulevard, near
Carnelian Bay, Placer County.

HOMEOWNERS ASSOCIATIONS:

Most homeowners associations own all or a majority of the littoral property adjacent to where facilities are placed on sovereign lands. As such, homeowners associations are generally the well qualified applicants to hold a lease due to their ability to provide water-oriented recreational opportunities to a larger number of the public. However, to provide that benefit homeowners associations need to ensure that the facilities placed on sovereign lands are available to all members of the homeowners association on a fair and equitable basis. Ensuring that these types of facilities are available to all members also promotes the Commission's multiple use management goals to provide the greatest possible public benefit from Public Trust lands.

Staff has worked for many years to ensure that sovereign lands leased by a homeowners association are made available to all of the association members in a fair and equitable manner by including specific provisions in the lease that require the facilities are made available to all members on a fair and equitable basis.

CEDAR FLAT BACKGROUND INFORMATION:

In 1969, the Commission authorized a lease with the Cedar Flat Improvement Association (Association) for the construction and maintenance of a pier at Lake

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Tahoe. Replacement leases for the pier, and ultimately 21 mooring buoys, were approved by the Commission over the years since the first lease was issued. On September 19, 2000, the Commission authorized a ten-year General Lease – Recreational Use with the Association beginning September 29, 1998, for an existing pier and 21 mooring buoys. Among other provisions, the lease required the Association to provide all of its members with access to the buoys in an equitable manner. The lease expired on September 28, 2008.

The Association, consisting of approximately 131 homeowners, owns two narrow lakefront parcels, (APN 092-190-010 and APN 092-180-008 and are identified as the beach parcels on the attached Exhibit A) adjacent to State sovereign land in Lake Tahoe. The Association's lakefront beach parcels are located between elevation 6,223 feet Lake Tahoe Datum (Low Water Mark) and a row of 12 adjacent non-littoral lots improved with residences. The Association's lakefront parcels are used as common areas for use by the Association's members, their guests, and invitees for recreational purposes. The 12 non-littoral lot owners, along with the other 119± members who own lots on the west side of Highway 28, constitute the entire Association. Eleven of the 12 non-littoral owned lots have private piers that cross the Association's lakefront parcels and, under a 1995 Settlement Agreement (Agreement) with the Association, were given permission to construct and maintain piers on these parcels. Staff has determined that eight of these piers extend below the Low Water Mark. Each of these piers is either currently under lease or is in the application process with the Commission for a replacement lease. Staff is verifying information for the other three piers in order to determine if they are located below the Low Water Mark.

In 2007, while processing a lease application for one of the above mentioned private piers, staff became aware of the 1995 Agreement that resolved litigation between 11 non-littoral homeowners/members and the Association. In addition to the right to maintain a pier, the Agreement gave 11 of the 12 non-littoral owners permanent private use of up to buoys each out of the Association's authorized 21 buoys. Staff notified the Association that the Commission had no prior knowledge of the Agreement, that the Agreement was not disclosed when the application was submitted or when it was later revised, and that it was not a party to the litigation or the Agreement and therefore not bound by it. Staff also advised the Association that the Agreement violated the lease issued by the Commission because it permanently assigned buoys to various individuals for their exclusive use and did not make the buoys available to other members.

On March 10, 2008, staff met with representatives of the Association to discuss the lease provisions in regard to the use of the 21 buoys by all of the members and the issue of the additional unauthorized buoys placed in the Lake by members. It was represented to staff that the Association was in disagreement

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with the lease provision and believed that the 1995 Agreement was the overriding governing document in regard to the Association's implementation of the buoy program. Commission staff disagreed with their conclusion regarding the lease and did not accept the provisions of the Agreement providing for the allocation of buoys. Staff recommended that the Association take immediate action to implement the lease's covenants so that the Commission would not have to declare the Association to be in breach of its lease.

Since that meeting, staff has advised the Association and their consultant that staff would be supportive of an Association lease application for a new General Lease – Recreational Use if the Association provides evidence that the Association owns all facilities - pier, buoys, and buoy tackle - and provides fair and equitable access of all facilities to all members of the Association. Staff's intent is to not have the facilities removed, but to have the facilities available to all members.

On June 4, 2008, staff wrote the Association Board members to reiterate what was discussed at the March 8, 2008 meeting and the various subsequent discussions that took place with some of the Association Board members and of the need to submit an application. In fact, since June 2008, staff has sent at least seven letters to the Association advising them to apply for a new lease and to provide information as to how the Association's buoys would be made available to the members in an equitable manner. In the June 4th letter, the Association was also advised that the buoy field contained more than the 21 buoys authorized by the Commission and staff recommended that the Association take immediate action to implement the lease's covenants and to remove the unauthorized buoys. To date, the trespass buoys have not been removed.

On March 9, 2009, a lease application was submitted by the Association for the existing pier, 21 mooring buoys, and 61 additional mooring buoys. As noted above, several of the additional buoys have already been placed in the Lake without the Commission's authorization. Staff informed the Association that the additional mooring buoys could not be approved without evidence of a Tahoe Regional Planning Agency permit and requested that the Association amend its application to include only those existing facilities previously authorized by the Commission. In addition, the Association was once again asked to provide evidence that the Association owns all of the facilities and that they are being provided to all of its members in a fair and equitable manner.

Minutes from the Association's May 9, 2009 Board of Director's meeting, indicate that the Association's consultant recommended, and the Board approved, that the response to Commission staff regarding buoy allotments should be general

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and broad and should also state that the Association allocates the buoys pursuant to a previous agreement (the Agreement) and that the allocation process can be refined in the future. On June 17, 2009, staff received a response from the Association's consultant regarding buoy allotment and stated in the letter that the Association intended to allot the buoys consistent with their adopted "Governing Documents", and would continue to do so in the future. The reference to "Governing Document" is a reference to the 1995 Agreement; therefore, the response provided was inadequate and as it did not address staff's request.

On July 13, 2009, Commission staff received an amended lease application for authorization of a pier and 21 mooring buoys all owned by the Association. However, the Association did not submit evidence of having adopted a buoy management program which would assure all members of the Association equitable access to the buoys.

With regard to the previously authorized buoy field, it should be noted that the Commission's expired lease to the Association specified that the 21 buoys were to be arrayed in a grid pattern in front of the Association's pier. In fact, it appears from a site inspection conducted by staff on July 16, 2009, that the Association has not configured the buoys in that manner and instead has placed them in a line parallel to the Association's beach parcels and directly in front of the 12 non-littoral lot owners. This also is a breach of the lease.

Based on the above, staff recommends that the application submitted by the Association be denied and that Commission staff and the Office of the Attorney General be authorized to take whatever steps are necessary to remove the Association's facilities (pier and all buoys regardless of whether they were previously authorized) located on the bed of Lake Tahoe waterward of elevation 6,223 feet Lake Tahoe Datum and seek other remedies available for breach of the terms of Lease No. PRC 4173.1.

OTHER PERTINENT INFORMATION:

1. The Association owns the uplands adjoining the lease premises.
2. The Association is a Property Improvement Association.
3. The Commission has previously issued leases to eight of the 12 non-littoral lot owners. Four of those leases are still in effect and pay annual rent as they are not littoral property owners. Three of those leases also authorized the placement of buoys in the Lake and they will expire in the next few years and at which time the buoy authorization will be withdrawn because the non-littoral lot owners cannot obtain a permit from the Tahoe

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Regional Planning Agency under its current ordinances. Two of the other non-littoral owners with private piers extending below the Low Water Mark have filed applications with the Commission and are currently being processed by staff for a new lease for the piers.

4. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that this activity is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c)(3) and 15378.

EXHIBIT:

- A. Site and Location Map

RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

CEQA FINDING:

FIND THAT THE ACTIVITY IS NOT SUBJECT TO THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15060 (c)(3) BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15378.

AUTHORIZATION:

1. AUTHORIZE DENIAL OF THE APPLICATION FOR A GENERAL LEASE - RECREATIONAL USE, SUBMITTED ON MARCH 9, 2009.
2. FIND THAT CEDAR FLAT IMPROVEMENT ASSOCIATION IS IN TRESPASS ON STATE-OWNED SOVEREIGN LAND LOCATED IN LAKE TAHOE, ADJACENT TO ASSESSOR'S PARCEL NOS. 092-180-008 AND 092-190-010, PLACER COUNTY, AS SHOWN ON THE ATTACHED EXHIBIT A.
3. AUTHORIZE STAFF OF THE STATE LANDS COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL TO TAKE ALL NECESSARY LEGAL STEPS, INCLUDING LITIGATION, TO EJECT CEDAR FLAT IMPROVEMENT ASSOCIATION; TO SEEK

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REMOVAL OF ALL IMPROVEMENTS FROM STATE SOVEREIGN LANDS IN LAKE TAHOE, ADJACENT TO ASSESSOR'S PARCEL NOS. 092-180-008 AND 092-190-010, PLACER COUNTY; TO SEEK RESTORATION OF THE SOVEREIGN LANDS AT THIS LOCATION TO THEIR CONDITION PRIOR TO PLACEMENT OF THE IMPROVEMENTS TO THE SATISFACTION OF THE COMMISSION; TO SEEK OTHER REMEDIES FOR THE BREACH OF LEASE PRC 4173.1 AND TO RECOVER THE COMMISSION'S DAMAGES AND COSTS.